

**Omnitest Inspection Services, Inc. and Daniel McCool and Patrick Barrett**

**Omnitest Inspection Services, Inc.; Amspec Technical Services, a Partnership; Amspec Technical Services, Inc. and Daniel McCool and Local 2B, International Union of Operating Engineers, AFL-CIO and United Association of Journeymen and Apprentices of the Plumbing and Pipefitting Industry of the United States and Canada, AFL-CIO.** Cases 22-CA-14369 and 22-CA-14673

December 19, 1995

**SECOND SUPPLEMENTAL DECISION AND ORDER**

BY CHAIRMAN GOULD AND MEMBERS BROWNING  
AND TRUESDALE

On September 19, 1995, Administrative Law Judge Steven Davis issued the attached second supplemental decision. The General Counsel filed a letter stating exceptions to the judge's second supplemental decision.

The National Labor Relations Board has delegated its authority in this proceeding to a three-member panel.

The Board has considered the second supplemental decision and the record in light of the General Counsel's exceptions and has decided to affirm the judge's rulings, findings, and conclusions<sup>1</sup> and to adopt the recommended Order.

<sup>1</sup> The judge's dismissal of personal liability allegations concerning Respondent Daniel McCool, for "lack of prosecution," was, in this case, a matter within the judge's discretion. On evaluation of the relevant circumstances, we find that the judge did not abuse his discretion. See, e.g., *Canova Moving & Storage Co. v. NLRB*, 708 F.2d 1498 fn. 4 (9th Cir. 1983), *enfg.* 261 NLRB 639 (1982). For example, it is noteworthy that 2 years after the Board remanded this case at the General Counsel's request, the General Counsel still has no evidence to offer concerning the personal liability of McCool. Accordingly, in disagreement with our colleague, we find that it was entirely appropriate for the judge to conclude that further action in this case is not warranted.

Contrary to her colleagues, Member Browning would not adopt the judge's dismissal of the personal liability allegations, but rather would grant the General Counsel's request that this case be remanded to the Regional Director with specific instructions that a hearing be held within 30 days from the date of the remand for the purpose of receiving evidence on the personal liability of Daniel McCool. Member Browning notes that the General Counsel has stated that he is ready to proceed to a hearing on this issue, and that no party to this case is claiming to have been prejudiced by the delay in scheduling a hearing, and I can perceive no basis for any claim that Respondent Daniel McCool or any other party has been prejudiced. In Member Browning's view, the interests of the parties who have been harmed by the Respondent's unlawful conduct will be served best by permitting the General Counsel to complete his investigation and present his evidence at a hearing before the judge.

**ORDER**

The recommended Order of the administrative law judge is adopted and the allegations of the compliance specification that Respondent Daniel McCool is personally liable for the backpay due are dismissed.

*Marta Figueroa, Esq.*, for the General Counsel.

*Fred R. Kimmel, Esq. (Fred R. Kimmel & Associates)*, of Chicago, Illinois, for the Respondent.

*Walter Russell*, Business Agent, for Local 2B.

**SECOND SUPPLEMENTAL DECISION AND RECOMMENDED ORDER**

STEVEN DAVIS, Administrative Law Judge. On February 14, 1994, the Board issued its Supplemental Decision and Order in 313 NLRB 648, remanding the matter to the Regional Director for Region 22 for the holding of a hearing before me, so that the General Counsel would have an opportunity to present evidence on the issue of the personal liability of Daniel McCool (Respondent).

Shortly after the Supplemental Decision and Order issued, I spoke with counsel for the General Counsel who told me that he had spoken to McCool, and was informed that McCool no longer had legal representation, and that McCool was scheduled to begin a period of incarceration in Illinois.

By letter to the Regional Director dated October 26, 1994, I set forth the above facts, and inquired as to the status of the matter. In about November 1994, I was informed by the Regional Director's office that the case had been assigned to another Board agent.

Not having received any communication from the Regional Office thereafter concerning this matter, nor any notification of any efforts to arrange a remanded hearing, or that the General Counsel had any evidence to present at a remanded hearing on May 2, 1995, I issued an Order to Show Cause, directing all parties to show cause, if there be any, by June 5, 1995, why I should not issue a supplemental decision and recommended Order, affirming that part of the Supplemental Decision and Order issued on June 23, 1993, which dismissed the allegations that McCool was personally liable for the backpay due.

On June 2, 1995, I received a response to the Order to Show Cause by a new counsel for the General Counsel. She stated:

It is urged that a supplemental decision and recommended Order not issue as the issue of McCool's personal liability is being actively investigated. Thus, the Regional Office agents have discovered fresh leads pointing to an alter ego connected directly with McCool. It is anticipated that the investigation will conclude and we will be able to request a new hearing date within 90 days.

Nineteen months have elapsed since the issuance of the Board's Order remanding this matter for a hearing. In all that time, I have received no indication that the General Counsel possessed any evidence concerning the single issue she sought to litigate, or was prepared to proceed to the requested hearing.

The only times any communication was received from the General Counsel was when I prompted the Regional Office, first by letter in October 1994 and then by Order to Show Cause in May 1995.

No communication has been received, following the expiration of the General Counsel's requested 90-day extension of the Order to Show Cause, stating the status of the "active" investigation, or in explanation of the failure to set a hearing date.

In addition to the 90-day extension to the Order to Show Cause, the General Counsel had sufficient time, from February 1994 to May 1995, to conduct an investigation into this matter. I believe that granting any further extension of time would be an abuse of process, and that the matter should be dismissed for lack of prosecution.

On these findings of fact and conclusions of law and on the entire record, I issue the following recommended<sup>1</sup>

#### ORDER

It is ordered that that part of the Supplemental Decision and Order of June 23, 1993, dismissing those allegations of the compliance specification that Daniel McCool is personally liable for the backpay due is affirmed.

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<sup>1</sup> If no exceptions are filed as provided by Sec. 102.46 of the Board's Rules and Regulations, the findings, conclusions, and recommended Order shall, as provided in Sec. 102.48 of the Rules, be adopted by the Board and all objections to them shall be deemed waived for all purposes.